tion to review the District Court determination, and this in turn depends on whether a three-judge court was required. We hold that it was not.

"At the outset, we agree with the District Court that the Commerce Clause and Fourteenth Amendment claims alleged in the complaint are too insubstantial to support the jurisdiction of a three-judge court. It has long been held that no such court is called for when the alleged constitutional claim is insubstantial. Ex parte Poresky, 290 U.S. 30, 78 L. ed. 152, 54 S. Ct. 3; California Water Service Co. v. City of Redding, 304 U.S. 252, 82 L. ed. 1232, 58 S. Ct. 865. . . ."

See also *Bailey v. Patterson*, 369 U.S. 31, 33 (1962), to the same effect. Indeed, this Court has long held to the *Poresky* view that three-judge courts are not required "where no substantial question as to the validity of the state legislation is involved". See *Jacobs v. Tawes*, 250 F. 2d 611, 614 (4th Cir., 1957):

"Petitioner contends, however, that the District Judge was without jurisdiction to dismiss the case, arguing that, since a court of three judges was required for the hearing of the application for injunction, a single judge had no jurisdiction to take any action in the case and, because of the provisions of 28 U.S.C. Chapter 2284(5), might not dismiss it, even though no claim for relief cognizable in a federal court was stated in the complaint. We think that this contention is entirely without merit. . . . The purpose of the requirement of three judges for the hearing of such a case is to prevent the improvident invalidation of state legislation by action of a single judge. . . . The presence of the two additional judges is not required where no substantial question as to the validity of the state legislation is involved. Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 4, 78 L. ed. 152; Davis v. County School Board of Prince Edward County, D.C., 142 F. Supp. 616. The same is held where no basis for injunctive relief is asserted. . . ."

The Maryland District Court has also followed this restrictive rule for the convening of a three-judge court. *Chester v. Kinnamon,* 276 F. Supp. 717, 720 (Md., 1967).

Therefore, it is clear that a single district court judge has the power to dismiss a suit attacking the constitutionality of a state statute or regulation if the constitutional issues are frivolous or insubstantial, and the only remaining issue on this petition is whether the Petitioner's claims fall within that category.

Petitioners are attacking a bylaw of the Maryland State Board of Education which states as follows:

> "It is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the curriculum including a planned and sequential program of health education" (Petition 12a).

Pursuant to the bylaw, programs "were initiated in the Baltimore County Public School System through the . . . Baltimore County Board of Education" (Petition 3).

Petitioners have alleged in their Complaint that this program "infringed upon and denied the Petitioners free exercise of their religious concepts and that the program in question has established religious concepts by the theories it is based upon, all in contravention to the proscriptions of the First Amendment to the Constitution of the United States applied to State action by the Fourteenth Amendment" (Petition 3-4).

Viewing the Complaint in a light most favorable to the Petitioners, relief is sought only because some part of this course of instruction conflicts with the religious views of the Petitioners. In a complete and exhaustive opinion, the District Court surveyed the relevant cases decided by the

Supreme Court of the United States and concluded that, in light of these decisions, "the federal question here is plainly insubstantial" (Petition 9a). The Court of Appeals for the Fourth Circuit in a Per Curiam opinion agreed with the District Court and affirmed its dismissal of the action. (Petition 1a-2a.) It would be unduly repetitious to recount the opinion of the District Court in this brief. By way of supplementation the Respondent would, however, make particular reference to *Epperson v. Arkansas*, 393 U.S. 97 (1968), where the Supreme Court struck down a state statute which forbade the teaching in the public schools of the theory that mankind ascended or descended from a lower order of animals. In holding that the Arkansas anti-evolution statute violated the Establishment and Free Exercise Clause of the First Amendment, the Supreme Court said the following:

> ". . . There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. . . ."
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> ". . . [T]he State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. *Abington School District*, 374 U.S. at 225, 10 L. Ed. 2d at 860. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in *Joseph Burstyn, Inc. v. Wilson*, 'the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . .' 343 U.S. 495, 505, 96 L. Ed. 1098, 1108, 72 S. Ct. 777 (1951). The test was stated as follows in *Abington School District v. Schempp, supra*, at 222, 10 L. Ed. 2d at 858: '[W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition

> of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'"
>
> ". . . No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens . . ." (393 U.S. at 106-107).

The *Epperson* decision noted the "overriding fact" that "Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine". 393 U.S. at 103.

The Petitioners seek to accomplish here by judicial interposition precisely what the Supreme Court has said could not be done by legislation, to wit, proscribe the teaching of a body of knowledge solely because it conflicts with a particular religious doctrine. The Respondent submits that the instant case is foreclosed by the clear pronouncement of the Supreme Court in Epperson.

Epperson invalidated the anti-evolution statute as a violation of both the Establishment and the Free Exercise Clause of the First Amendment. Moreover, the effect of Epperson was to permit the teaching of the theory of evolution in the public schools, a teaching directly contrary to the beliefs of those students who ascribe to Fundamentalist doctrines. Even if it could be argued that those students are denied, to some degree, the free exercise of their religious beliefs by virtue of their being exposed to the teaching of the theory of evolution, nevertheless, such teaching has been held to be constitutionally permissible.

Also of interest is *Calvary Bible Presbyterian Ch. v. Board of Regents*, 436 P. 2d 189 (Wash., 1968). The Supreme Court of Washington held that a public college

course entitled "The Bible as Literature" did not violate that state's constitutional provision which was similar to the First Amendment. The language of that case is particularly apposite here:

> "There can be no doubt that our constitutional bars are absolute against religious instruction and indoctrination in specific religious beliefs or dogma; but they do not proscribe open, free, critical, and scholarly examination of the literature, experience, and knowledge of mankind. If they did, many fields of scholarship — anthropology, zoology, the theory of evolution, astronomy, the germ theory of disease and medical cure, to mention only a few — would have to be removed from our university. It might be said that the objective examination of these theories conflicts with the religious beliefs of certain persons entertaining contrary beliefs based upon their religious convictions. This would, indeed, be true 'sectarian control or influence', which is prohibited by Article 9, Section 4 of our constitution. It would, as Mr. Justice Brennan said so recently,
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> > cast a pall of orthology over the classroom. Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967),"

The District Court succinctly summarized the First Amendment issue in the instant case as follows (Petition 9a):

> "Now, applying these principles that have been established by these various cases, it is quite clear to this Court that the purpose and primary effect of the By-Law here is not to establish any particular religious dogma or precept and does not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion. The By-Law may be considered quite simply as a public health measure. As the Supreme Court indicated in Prince v. Massachusetts, 321 U.S. 158, the State's interest in the health of its children outweighs claims based upon

religious freedom and the right of parental control. The Court in that particular case said this:

> 'A democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.' "

CONCLUSION

For the reasons above stated, it is submitted that the Petitioners' constitutional attacks upon the Respondents' bylaw are insubstantial and frivolous, and in view of the District Court's granting of the Motions to Dismiss and the affirmance of said dismissal by the Circuit Court of Appeals (4th), the Petition for Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

MARTIN B. GREENFELD,
Assistant Attorney General
of Maryland,

MALCOLM R. KITT,
Special Assistant Attorney
General of Maryland,
1200 One Charles Center,
Baltimore, Md. 21201,

For Respondent,
State Board of Education.